

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 86

Date Signed: March 3, 1995

MEMORANDUM

SUBJECT: Processing Requests for Use of Enforcement Discretion

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

In light of the reorganization and consolidation of the Agency's enforcement and compliance assurance resources activities at Headquarters, I believe that it is useful to recirculate the attached memorandum regarding "no action" assurances¹ as a reminder of both this policy and the procedure for handling such requests. The Agency has long adhered to a policy against giving definitive assurances outside the context of a formal enforcement proceeding that the government will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or legal requirement. This policy, a necessary and critically important element of the wise exercise of the Agency's enforcement discretion, and which has been a consistent feature of the enforcement program, was formalized in 1984 following Agency-wide review and comment. Please note that OECA is reviewing the applicability of this policy to the CERCLA enforcement program, and will issue additional guidance on this subject.

A "no action" assurance includes, but is not limited to: specific or general requests for the Agency to exercise its enforcement discretion in a particular manner or in a given set of circumstances (i.e., that it will or will not take an enforcement action); the development of policies or other statements purporting to bind the Agency and which relate to or would affect the Agency's enforcement of the Federal environmental laws and regulation; and other similar requests for forbearance or action involving enforcement-related activities. The procedure established by the Policy requires that any such written or oral assurances have the advance written concurrence of the Assistant Administrator for Enforcement and Compliance Assurance.

The 1984 reaffirmation of this policy articulated well the dangers of providing "no action" assurances. Such assurances erode the credibility of the enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. Given limited Agency

¹ Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, Policy Against "No Action" Assurances (Nov. 16, 1984) (copy attached)

resources, this credibility is a vital incentive for the regulated community to comply with existing requirements. In addition, a commitment not to enforce a legal requirement may severely hamper later, necessary enforcement efforts to protect public health and the environment, regardless of whether the action is against the recipient of the assurances or against others who claim to be similarly situated.

Moreover, these principals are their most compelling in the context of rulemakings: good public policy counsels that blanket statements of enforcement discretion are not always a particularly appropriate alternative to the public notice-and-comment rulemaking process. Where the Agency determines that it is appropriate to alter or modify its approach to specific, well-defined circumstances, in my view we must consider carefully whether the process (especially where the underlying requirement was established by rule under the Administrative Procedures Act), or through piecemeal expressions of our enforcement discretion.

We have recognized two general situations in which a no action assurance may be appropriate: where it is expressly provided for by an applicable statute, and in extremely unusual circumstances where an assurance is clearly necessary to serve the public interest *and* which no other mechanism can address adequately. In light of the profound policy implications of the granting of no action assurances, the 1984 Policy requires the advance concurrence of the Assistant Administrator for this office. Over the years, this approach has resulted in the reasonably consistent and appropriate exercise of EPA's enforcement discretion, and in a manner which both preserves the integrity of the Agency and meets the legitimate needs served by a mitigated enforcement response.

There may be situations where the general prohibition on no action assurances should not apply under CERCLA (or the Underground Storage Tanks or RCRA corrective action programs). For example, at many Superfund sites there is no violation of law. OECA is evaluating the applicability of no action assurances under CERCLA and RCRA and will issue additional guidance on the subject.

Lastly, an element of the 1984 Policy which I want to highlight is that it does not and should not preclude the Agency from discussing fully and completely the merits of a particular action, policy, or other request to exercise the Agency's enforcement discretion in a particular manner. I welcome a free and frank exchange of ideas on how to best respond to violations, mindful of the Agency's overarching goals, statutory directives, and enforcement and compliance priorities. I do, however, want to ensure that all such requests are handled in a consistent and coordinated manner.

Attachment

cc: OECA Office Directors
Regional Counsels
Regional Program Directors

Note: The attachment referred to in this guidance is WSG 24 of this manual.